

Submission to the NSW Law Reform Commission
Anti-Discrimination Act 1977: Response to the Consultation
Paper

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Introduction

I am an Emeritus Professor of Law at the University of Queensland and a specialist, inter alia, in family law and child protection. Most of my career was at the University of Sydney.

I have engaged with various aspects of anti-discrimination law over the years, but for the sake of brevity, this submission is confined to an explanation of some complex issues concerning gender identity in children and young people in response to question 4.8. There are significant child protection issues that need to be considered, as well as issues concerning how recognition of gender identity could impact upon other students.

For the reasons I will give, I recommend that gender identity or transgender identification only be a legally protected attribute once a young person has reached the age of 18 and is habitually living as a member of the opposite sex.

The complex issues concerning gender identity in school settings

Particular difficulties are likely to arise from the suggestion that the law should be amended to move from ‘transgender grounds’ to ‘gender identity’ as is the case in some other jurisdictions. Given the huge problems this has caused and is still causing, it is these other jurisdictions that ought to consider amending their laws to address the problems.

It is now well-known that there has been a massive increase in teenagers, many of them mentally very unwell, who are identifying as transgender or non-binary.¹

The huge rise in adolescent identification as transgender

Transgender identification used to be rare. In the DSM-5 (2013), the leading manual of mental health disorders, prevalence was estimated at 0.005% to 0.014% for natal adult males, and from

¹ Kenneth Zucker, ‘Adolescents with Gender Dysphoria: Reflections on Some Contemporary Clinical and Research Issues’ (2019) 48(7) *Archives of Sexual Behavior* 1983.

0.002% to 0.003% for natal females.² That is, it was quite rare in either sex, but typically 3-5 times as many males as females had gender dysphoria.

Current rates of transgender identification in minors, based on surveys, are hundreds of times as high as the historic prevalence across the western world. There has also been an inversion of the sex ratio, with around 70% of teenagers presenting with gender incongruence, being natal females.³ The research evidence strongly points to psychological factors as explaining this massive increase in gender incongruence within a very short period of time.

The prevalence of co-morbid mental health problems

Most adolescents presenting with gender incongruence have significant mental health problems not explicable by minority stress, including eating disorders, body dysmorphia and ADHD. Disproportionately, they are on the autism spectrum.⁴ Many also have serious psychiatric comorbidities.⁵ As an illustration, studies conducted on the cohort of young people being treated by the Royal Children's Hospital, Melbourne, Gender Service, indicate that 46% have autistic traits⁶ and 25% reported suffering from eating disorders.⁷

Research conducted at the Children's Hospital at Westmead, Sydney, indicates that many of the young people seeking medical treatments for gender dysphoria have suffered adverse childhood events, family dysfunction or disordered attachments.⁸

² American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, (5th ed, 2013), p. 454.

³ Madison Aitken et al, 'Evidence for an Altered Sex Ratio in Clinic-Referred Adolescents with Gender Dysphoria' (2015) 12(3) *Journal of Sexual Medicine* 756.

⁴ Annelou de Vries et al, 'Autism Spectrum Disorders in Gender Dysphoric Children and Adolescents' (2010) 40(8) *Journal of Autism and Developmental Disorders* 930; Vicky Holt, Elin Skagerberg and Michael Dunsford, 'Young People with Features of Gender Dysphoria: Demographics and Associated Difficulties' (2016) 164 *Clinical Child Psychology and Psychiatry* 108.

⁵ Riittakerttu Kaltiala-Heino et al, 'Two Years of Gender Identity Service for Minors: Overrepresentation of Natal Girls with Severe Problems in Adolescent Development' (2015) 9 *Child and Adolescent Psychiatry and Mental Health* 9; Tracy Becerra-Culqui et al, 'Mental Health of Transgender and Gender Nonconforming Youth Compared With Their Peers' (2018) 141(5) *Pediatrics* e20173845.

⁶ M Tollit et al, 'A comparison of gender diversity in transgender young people with and without autistic traits from the Trans 20 cohort study' , (2024) 47 *The Lancet Regional Health – Western Pacific*, 101084.

⁷ J. Kerr et al, 'Prevalence of Eating Disorder Symptoms in Transgender and Gender Diverse Adolescents Presenting for Gender-Affirming Care' (2024) 74 *Journal of Adolescent Health*, 850.

⁸ Kasia Kozłowska et al, 'Attachment Patterns in Children and Adolescents with Gender Dysphoria', (2021) 11 *Frontiers in Psychology* 582688; Kasia Kozłowska et al, 'Australian Children and Adolescents with Gender Dysphoria: Clinical Presentations and Challenges Experienced by a Multidisciplinary Team and Gender Service' (2021) 1(1) *Human Systems: Therapy, Culture and Attachments*, 70.

Gender fluidity and the transience of gender incongruence

Beyond the number who seek medicalisation through puberty blockers and cross-sex hormones at gender clinics, there are a great many more who identify at school as ‘transgender’ or ‘gender-diverse’, including ‘non-binary’. It is very likely that most of these identifications will be transient. For example, a study of responses of over 3000 9th-12th graders in Pittsburgh, Pennsylvania in 2018 found that 9.2% identified as a gender other than their natal sex, choosing one or more of “trans girl,” “trans boy,” “genderqueer,” “nonbinary,” and “another identity.”⁹ 39% were natal males identifying as female, 30% of these were natal females identifying as male, and 31% were non-binary, ‘genderqueer’, chose another identity or adopted more than one descriptor.

Unless rates of gender identity disorder, as it used to be known, or gender dysphoria, were massively undiagnosed in the past, it is likely that for the vast majority of these teenagers in Pittsburgh, the transgender or non-binary identification is a passing phase on the journey of adolescent exploration.

Peer and social influences

There is now a lot of evidence that peer and social influences are playing a role in persuading at least some young people that they are transgender.¹⁰ This ought not to be surprising. In recent years a high profile has been given to transgender issues. Popular figures on YouTube promote a somewhat rosy view of the transition journey.¹¹ Media reporting about transgender issues has also been shown to have significant impact on referrals to gender clinics in England and Australia.¹²

The relevance of anti-discrimination law

What rights and obligations flow from recognition of gender identity in law?

The fundamental problem with the protection of ‘gender identity’ in anti-discrimination law is that it is often unclear what rights and responsibilities flow from this. Does the law just protect the person from adverse actions such as refusal of service in a shop, or does it require that the person be treated as the gender with which they identify?

⁹ Kacie Kidd et al, ‘Prevalence of Gender-Diverse Youth in an Urban School District’ (2021) 147(6) *Pediatrics* e2020049823.

¹⁰ See e.g. Lisa Littman, ‘Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria’ (2018) 13(8) *Plos One* e0202330 (as amended, 2019).

¹¹ Elin Lewis, ‘Transmission of Transition via YouTube’ in Michele Moore and Heather Brunskell-Evans (eds) *Inventing Transgender Children and Young People* (Newcastle, UK: Cambridge Scholars Publishing, 2019) 180.

¹² Ken Pang et al, ‘Association of Media Coverage of Transgender and Gender Diverse Issues with Rates of Referral of Transgender Children and Adolescents to Specialist Gender Clinics in the UK and Australia’ (2020) 3(7) *JAMA Network Open* e2011161: 1-10.

NSW law on this, at present, has the virtue of at least being clear. Section 38B of the Anti-Discrimination Act states that it is unlawful to treat an aggrieved person, being a recognised transgender person, as being of the person's former sex. That is now defined as someone whose sex has been altered under Part 5A of the Births, Deaths and Marriages Registration Act 1995 or corresponding provisions in other jurisdictions. There is no obligation otherwise to treat someone as the sex with which they identify. However, that distinction does seem to be lost in application of the law in practice, and of course, educational institutions and other bodies also have to consider the meaning of the Commonwealth's *Sex Discrimination Act* which is far from a model of clarity.

The difficulties are illustrated in the NSW Education Department's guidance on these issues.¹³ On the one hand it leaves much to the discretion of school principals. It provides that:

“Where reasonably practicable, the student should be treated on the same basis as other students of the same identified gender” and

“Students should not be required to use the toilets and change rooms used by persons of the sex they were assigned at birth if they identify as a different gender. Alternative arrangements may include using staff toilets or unisex toilets where possible. The exclusion of students who identify as transgender from the toilet or change rooms of their identified gender must be regularly reviewed to determine its continuing necessity.”

However, it also states:

“If the student is seeking enrolment at a single-sex school, a decision about their eligibility to enrol should be made on the basis of his or her identified gender.”

Impact on other students

The effect of NSW policy, influenced by the Education Department's understanding of the legal requirements, is that natal males must be allowed to enrol in girls' schools irrespective of whether they have taken any steps to transition medically. That has a lot of flow-on implications for the bodily privacy of classmates, safety and fairness in sports activities, accommodation on overnight excursions and a range of other issues.

In a multicultural society, it is important to be sensitive to the range of concerns that parents and students may have about the impact of such policies. If, because of its transgender policies, a school allows a natal male to change in the same space as girls who may be in a state of undress, the level of outrage from both students and parents could be considerable. This is especially so in cultures where modesty and bodily privacy are seen as very important, especially for girls beyond primary school age, and women.

¹³ ‘Transgender students in schools, *Legal Issues Bulletin No 55*, December 2014: <https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools> (last accessed, July 7th, 2025).

Legal issues with gender identity in children and adolescents

So to the extent that gender identity gives rise to a presumptive (but not absolute) right to be treated as the gender with which the child identifies, various legal questions arise. Medical treatment, of course, raises issues beyond the scope of this law reform exercise. The issue for the NSW Law Reform Commission ought to be when a child has a right to social transition that is recognised by the school, and in other contexts where discrimination law might be relevant.

Social transition

Social transition involves making gender-related changes to name, pronouns, registration of gender at school, and uniform. If children or young people make a social transition, this does not mean, necessarily, that they will go on to live permanently as another gender, nor even that they will take steps to transition medically, through taking puberty blockers, cross-sex hormones or undergoing major surgeries. However, social transition is typically a major step along the pathway to medical transition, particularly if the responses of the most important adults in the young person's life are to affirm his or her new gender identity unequivocally, and to support medical transition.

Once a decision to transition socially is made, the child or young person may have great difficulty reverting to their natal sex. As two leading paediatric gender clinicians explain:¹⁴

The rationale for supporting social transition before puberty is that children can revert to their originally assigned gender if necessary since the transition is solely at a social level and without medical intervention. Critics of this approach believe that supporting gender transition in childhood may indeed be relieving for children with [gender dysphoria] but question the effect on future development. The debate thereby focuses on whether a transition may increase the likelihood of persistence because, for example, a child may 'forget' how to live in the original gender role and therefore will no longer be able to feel the desire to change back; or that transitioned children may repress doubts about the transition out of fear that they have to go through the process of making their desire to socially (re)transition public for a second time.

The effect of social transition may be to lock a child into that identity and drive them to make changes to their bodies. An example is a teenage girl who is 'stealth' and who is living in school as a boy with her real sex unknown to her classmates. She can get away with that at 13, but by 16, the failure of her voice to drop in the normal manner that occurs in boys will become a matter of increasing discomfort and worry. So too will the growth of her breasts. So social transition drives more radical changes. If social transition leads to requests for cross-sex hormones and surgery, such as a double mastectomy, the implications are much greater. An

¹⁴ Jiska Ristori & Thomas Steensma, 'Gender dysphoria in childhood'. (2016) 28 *International Review of Psychiatry* 28, 13 at 17 (references omitted).

increasing number of young adults are now regretting the irreversible changes to their bodies that they demanded as teenagers, thinking they were trans.¹⁵

For these reasons, the decision to make a social transition is not lightly to be made, and requires sufficient maturity to be able to understand the implications and potential consequences. By making gender identity a prohibited basis for discrimination, questions may arise in practice as to whether schools have a legal obligation to allow a child or young person to transition socially, whatever the law may, technically, provide. Anti-discrimination law is conceptually quite complex, involving choosing the right comparator and applying the direct and indirect discrimination tests. In practice, its subtleties can be lost when applied by those not legally trained.

When does a child or young person have a legally protected gender identity?

An initial question is when a child or young person has a ‘gender identity’ that is protected by law? Does a small child, for example, have a legally protected gender identity, and if so, who determines this and in accordance with what threshold? If a four year old boy likes playing with dolls and wearing a dress when playing ‘dress-ups’, does this mean he has a legally protected gender identity that is incongruent with his natal sex? The common sense answer to this is no. It cannot yet be said that there is anything in the child’s play that would justify the drastic step of treating him as other than a boy. Indeed, in the past, a substantial majority of children who have been patients of specialist gender clinics have resolved these issues before or around the time of puberty. Most go on to be gay or lesbian adults.¹⁶

One answer to the question of when a child has a legally protected gender identity might be if he or she is clinically diagnosed with gender dysphoria. The *Diagnostic and Statistical Manual of Mental Disorders* (version 5)¹⁷ defines gender dysphoria in children as involving “a marked incongruence between one’s experienced/expressed gender and assigned gender”. Essential is that the child expresses a strong desire to be of the other gender or an insistence that he or she is the other gender. In addition, at least five other criteria must be satisfied in order to make a

¹⁵ Lisa Littman, ‘Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners’ (2021) *Archives of Sexual Behavior*, <https://doi.org.ezproxy.library.uq.edu.au/10.1007/s10508-021-02163-w>; Elie Vandenbussche, ‘Detransition-related Needs and Support: A Cross-Sectional Online Survey’ (2021) *Journal of Homosexuality* <https://doi.org/10.1080/00918369.2021.1919479>.

¹⁶ See e.g. Thomas Steensma, et al, ‘Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study’ (2013) 52(6) *Journal of the American Academy of Child and Adolescent Psychiatry* 582; Ristori and Steensma, *ibid*; Devita Singh, Susan Bradley and Kenneth Zucker, ‘A Follow-Up Study of Boys with Gender Identity Disorder’, (2021) 12 *Frontiers in Psychiatry* 632784: 1-18.

¹⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, (5th ed, 2013).

clinical diagnosis.¹⁸ There are other criteria set out for diagnosing gender dysphoria in adolescence and adulthood.¹⁹

Having a clinical diagnosis of gender dysphoria would at least offer some rational basis for determining the point at which it could become discriminatory, as a matter of law, to take particular actions or fail to take such actions in a way that adversely impacts upon the child or young person. By not referencing gender dysphoria at all, there is likely to be confusion about the application of the law to children.

What about the rights of parents?

What if a young person's parents are opposed to his or her wish to engage in a social transition to identify as a member of the opposite sex? Arguably, an adolescent has a legally protected gender identity at the point at which she has the legal capacity to make a decision about social transition independently of her parents. Such a view would be based upon the common law principle explained by the House of Lords in *Gillick v West Norfolk and Wisbech A.H.A.*,²⁰ that young people gain some legal capacity to give their own consent to medical treatment, and by analogy therefore, other decisions, if they have sufficient maturity to understand all the issues involved.²¹

However, it is an error to suppose that Gillick-competence, as it is known, displaces parental authority entirely. In the related area of medically assisted transition, Watts J of the Family Court of Australia²² has made it clear in *Re Imogen (no 6)*,²³ that parents have a continuing role until the child turns 18. He held that, notwithstanding the Full Court's decision in *Re Kelvin*,²⁴ court approval is needed if a parent disputes either the Gillick-competence of an adolescent, a diagnosis of gender dysphoria, or the proposed treatment. Even if the young person is deemed Gillick-competent, the parents, or either of them, still have the right to go to court to question the diagnosis or treatment, should the teenager seek the prescription of cross-sex hormones. In the exercise of its *parens patriae* jurisdiction, a state or territory Supreme Court may override the wishes of a Gillick-competent minor,²⁵ and there is an analogous power in s.67ZC of the Family Law Act 1975 (Cth).

¹⁸ Ibid: 'Gender Dysphoria' at 302.6.

¹⁹ Ibid: 'Gender Dysphoria' at 302.85.

²⁰ [1986] AC 112.

²¹ The decision concerned the capacity of teenage girls under 16 to give consent to the prescription of the contraceptive pill without their parents' knowledge.

²² This Court is now known as the Federal Circuit and Family Court of Australia.

²³ [2020] FamCA 761.

²⁴ [2017] FLC ¶93-809.

²⁵ *X and Others v The Sydney Children's Hospital Network* (2013) 85 NSWLR 294 (court authorised a blood transfusion on a Gillick-competent 17 year old notwithstanding his refusal of that treatment); *H v AC* [2024]

Furthermore, the issue of Gillick-competence is far from straightforward when a child or young person wants to make very important decisions with potentially long-term implications. The application of the Gillick-competence test to adolescents with poor mental health, and who may be on the autism spectrum, is not nearly as straightforward as the question whether a healthy and intelligent fifteen year old could consent to an appendectomy in the absence of parental consent.²⁶

It follows that it is far from simple to say that an adolescent gains a legally protected gender identity when he or she is Gillick-competent. That just begs the question of who gets to decide the issue of Gillick-competence. When psychiatric illness or a neurobiological disorder such as autism is involved, what qualifications does the adult need who is being relied upon to assess Gillick-competence?

Conclusion

The observations above should be sufficient to make clear that if NSW were to adopt the approaches of other jurisdictions it would not assist the clarity of the law insofar as it concerns the rights of gender incongruent children and adolescents and the corresponding obligations of others. There is now huge medical controversy about providing puberty-blockers and cross-sex hormones to minors, with many countries, after thorough inquiries into the medical evidence, now banning or severely limiting the prescription of these powerful medications to minors expressing gender incongruence.

Issues also arise about those who identify as “non-binary”. There seems little reason to include non-binary identities, for there is no clarity about what it means to treat a person as “non-binary” and how that is or should be different from treating them as their bodily sex. Non-binary people are, from a medical perspective, either male or female apart from that small number who are properly identified as having an “intersex” condition. People’s self-identification as non-binary may be relevant for some purposes (people may politely defer to their wishes concerning pronouns, for example) but this is not a sufficient reason to make this a protected category in anti-discrimination law.

Given how fluid gender identity seems to be in childhood and adolescence, and all the problems, including the potential for serious harm, arising at least in part from vague anti-discrimination laws, I would recommend that legal protection for transgender identity in the NSW Anti-Discrimination Act be applicable only to those over 18 who are habitually living as a member of the opposite sex. It should be carefully defined, to exclude transient or fluid identities.

NSWSC 40 (court ordered cancer treatment against the wishes of a 17 year old girl and her parents).

²⁶ Lord Templeman in *Gillick*, above n.20, at 201 (dissenting in the outcome but not on this point).