

28 February 2021

Portfolio Committee No. 3 - Education
NSW Parliament
By email: portfoliocommittee3@parliament.nsw.gov.au

SUBMISSION ON THE EDUCATION LEGISLATION AMENDMENT (PARENTAL RIGHTS) BILL 2020

Dear Committee Members,

Community Legal Centres NSW, Inner City Legal Centre, HIV/AIDS Legal Centre and Community Legal Centres Australia are deeply concerned about the *Education Legislation Amendment (Parental Rights) Bill 2020* currently before you.

Trans and gender diverse young people exist. They deserve the same love and support as every other child and the same opportunities to thrive and reach their full potential, including in our school system.

If passed, this Bill would deny children in our community the right to be seen, to be protected from discrimination and harm, and to be treated with integrity by teachers and schools. It would deny children access to school counselling, leave them vulnerable to bullying, and make it even harder to get support and information during their critical formative years.

The Bill threatens the ethics and livelihoods of teachers – and non-teaching school staff – who support equality and safety for LGBTQI+ young people. It also requires schools, school staff and the NSW Education Standards Authority to act in ways that are inconsistent with the *Sex Discrimination Act 1984 (Cth)*, which creates a legal hurdle the Bill is unlikely to overcome.

KEY RECOMMENDATION

We recommend the Committee rejects this Bill in its entirety.

ABOUT INNER CITY LEGAL CENTRE

The Inner City Legal Centre is community legal centre located in the heart of Kings Cross. We've provided free legal services to residents of the inner city, North Shore, and the Northern Beaches since 1980. We also provide statewide legal services to LGBTQI+ clients.

In 2018, we established our Trans and Gender Diverse Legal Service in partnership with Dentons. This fortnightly service provides free legal advice to trans and gender diverse people living in NSW. We provide advice to clients on a broad variety of matters, including changes of name and birth records, discrimination, employment, family law, employment and criminal law. As a dedicated service, our Trans and Gender Diverse Legal Service responds to the unique

needs of trans and gender diverse people and ensures that this important part of our community has access to appropriate support and assistance.

ABOUT HIV/AIDS LEGAL CENTRE

The HIV/AIDS Legal Centre is a not-for-profit, specialist community legal centre. HIV/AIDS Legal Centre is funded to provide free and comprehensive legal assistance to financially disadvantaged people in NSW with HIV or Hepatitis-related legal matters. HIV/AIDS Legal Centre delivers services to people from vulnerable social and cultural backgrounds, including people from the LGBTIQI community, people with mental illness, sex workers, injecting drug users, people from the Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities. HIV/AIDS Legal Centre is the only full-time funded HIV/AIDS specialist legal centre in Australia. HIV/AIDS Legal Centre provides direct legal assistance to clients in a wide range of legal practice areas.

ABOUT COMMUNITY LEGAL CENTRES NSW

Community Legal Centres NSW is the peak representative body for 40 community legal centres in NSW. Our team supports, represents and advocates for our members with the aim of increasing access to justice for people in NSW.

Community Legal Centres NSW is committed to fairness and equality for minority communities, including the LGBTIQI+ community. Our member centre, Inner City Legal Centre, launched the specialist Trans and Gender Diverse Legal Service in September 2018. The Centre provides free legal advice to trans and gender diverse clients across the state, engages in advocacy, and undertakes law reform work to promote and protect trans and gender diverse people's rights. The HIV/AIDS Legal Centre provides free and comprehensive legal assistance to people with HIV or Hepatitis-related legal matters and has a long history in advocating for the rights of the LGBTIQI+ community. Other members, including the Public Interest Advocacy Centre and the Human Rights Law Centre, also engage in advocacy and law reform work to advance equality and justice for LGBTIQI+ people.

ABOUT COMMUNITY LEGAL CENTRES AUSTRALIA

Community Legal Centres Australia is the national peak body for the community legal sector, in particular community legal centres across Australia. We are an independent, non-profit organisation established to support the community legal sector and ensure provision of free and accessible legal and related services to everyday people, including people experiencing discrimination and disadvantage.

ABOUT THE EDUCATION LEGISLATION AMENDMENT (PARENTAL RIGHTS) BILL 2020

The *Education Legislation Amendment (Parental Rights) Bill 2020* ('the Bill') would amend the *Education Act 1990*, the *Education Standards Authority Act 2013* and the *Teacher Accreditation Act 2004*, to prohibit the teaching of 'the ideology of gender fluidity' in NSW government schools. The Bill defines 'gender fluidity' as:

a belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation) and human gender, and that human gender is socially constructed rather than being equivalent to a person's biological sex.

If passed, the Bill would entrench discrimination against transgender and gender diverse people in schools. It would do so by requiring the removal of content about gender diversity from all school curricula, introducing sanctions for teachers (and non-teaching staff) who teach gender diversity or support gender diverse young students, and by enabling parents and guardians to remove their children from any class that covers LGBTQI+ issues.

THE BILL & INQUIRY PROCESS INCREASE MENTAL HEALTH RISKS FOR VULNERABLE CHILDREN

The *Education Legislation Amendment (Parental Rights) Bill 2020* (the Bill) seeks to deny the existence of trans and gender diverse young people and to normalise mistreatment of and discrimination against them. A wealth of evidence shows that the denial of trans and gender diverse people's identities, and isolation from peers, are powerful drivers of mental ill-health and suicide attempts.¹ By mandating the denial of trans people's existence in schools and further isolating young people from their peers, the Bill will undermine the health and safety of trans and gender diverse young people and increase the risks of suicidal ideation and self-harm.

LGBTQI+ young people experience significant harm due to discrimination, stigma and victimisation. The 2017 *Trans Pathways* research report by Telethon Kids is the largest study ever conducted into the mental health of trans young people in Australia. It found that young trans people experience clinically significant depressive symptoms at almost ten times the rate of the general population of young people.² Of the 859 trans young people surveyed, 4 out of 5 reported self-harming. Almost half had attempted suicide at some point in their life.³ The report stresses that:

Although people who are LGBTIQ have a higher frequency of mental health disorders than the general population in Australia, it is important to emphasise that this is not because an individual identifies as LGBTIQ. Rather, these mental health issues are largely caused by how the world perceives and treats LGBTIQ people.

¹ See for example: Howe, B. G. (2018) 'Denying trans identity has serious impact on mental health', *The Conversation* 11 December 2018: <https://theconversation.com/denying-trans-identity-has-serious-impact-on-mental-health-108152>; Virupaksha, H. G., Muralidhar D. & Ramakrishna, J. (2016) 'Suicide and Suicidal Behaviour among Trans Persons', *Indian Journal of Psychological Medicine*, vol. 38, no. 6, pp. 505-509; Centre for Suicide Prevention, *Trans people and suicide*, <https://www.suicideinfo.ca/resource/trans-people-suicide/>.

² Strauss, P. et. al. (2017) 'Trans Pathways: The mental health experiences and care pathways of trans young people', *Telethon Kids*: <https://www.telethonkids.org.au/globalassets/media/documents/brain--behaviour/trans-pathwayreport-web.pdf>.

³ Ibid.

A recent systematic review conducted by New Zealand researchers of international qualitative research on LGBTQI+ youth and mental health also found that LGBTQI+ youth experience higher rates of mental ill-health due to social stress, discrimination, victimisation, prejudice, family non-acceptance and isolation. The same review identified key protective factors that promote mental health and wellbeing amongst LGBTQI+ young people, including a sense of belonging to a peer group, family acceptance and welcoming and accepting educational environments. The review noted in particular:

‘gay-straight alliances’, sometimes referred to as the ‘gender and sexuality alliances’, (GSAs) have been shown to have a positive effect in reduction of stigma in schools, with significantly better psychological outcomes (e.g. improvement in academic performance, feeling more comfortable in their sexual identity and empowerment), social outcomes (e.g. positive sexual diversity climates, greater sense of connectedness to their school), and also physical outcomes (e.g. lower levels of youths’ self-reports of homophobic victimization, fear of safety, and hearing homophobic remarks).⁴

Given the statistics cited above, we urge Committee members to consider the wellbeing of trans and gender diverse young people and ensure that the inquiry process does not become a mechanism for authorising inflammatory and discriminatory public debate about this already marginalised and highly vulnerable group. As demonstrated by the postal survey on marriage conducted by the Federal Government in 2017 and 2018, such debate is likely to increase psychological distress for LGBTQI+ young people in the community.⁵

THE BILL TARGETS AND HARMS LGBTQI+ SCHOOL STUDENTS AND TEACHERS

As well as prohibiting the development and teaching of curriculum on gender diversity, the Bill would also prevent teachers and non-teaching staff from acknowledging, respecting and supporting trans and gender diverse students in any way. The Bill specifically prohibits all ‘teaching, instruction, counselling and advice’ provided by:

- Teachers
- Non-teaching school executives (such as principals)
- Non-teaching school counsellors
- Non-teaching staff, contractors, advisors and consultants
- Non-school-based staff, contractors, advisors and consultants
- School volunteers.

In practice, this means that no-one connected with any government school in NSW, from principals to parents volunteering in the school canteen, would be able to acknowledge the fact that gender identity can be different to designated sex at birth.

This prohibition on the ‘endorsement’ of gender fluidity, combined with the threat of de-accreditation of any teacher found to be in breach, would operate to prevent teachers and other school staff from:

⁴ Wilson, C. & Cariola, L. (2020) ‘LGBTQI+ Youth and Mental Health: A Systematic Review of Qualitative Research’, *Adolescent Research Review*, Vol. 5, pp. 187-211: <https://link.springer.com/article/10.1007/s40894-019-00118-w>.

⁵ Ecker, S. et. al. (2019) ‘Impact of the Australian marriage equality postal survey and debate on psychological distress among lesbian, gay, bisexual, trans, intersex and queer/questioning people and allies, *Australian Journal of Psychology*, Vol 71(3), pp. 285 – 295, <https://aps.onlinelibrary.wiley.com/doi/abs/10.1111/ajpy.12245>.

- Using the correct pronouns and names for trans and gender diverse students. Deadnaming⁶ and misgendering⁷ trans people causes feelings of stigmatisation and poor self-esteem and contribute to harassment and discrimination against trans people.⁸
- Providing counselling services and other supports to gender diverse young people experiencing discrimination, harassment or other difficulties in the school environment.
- Intervening to stop transphobic bullying by other students (because telling other students to respect the gender identity of the child being bullied would amount to an acknowledgment that gender diversity exists).

The Bill also inappropriately targets intersex people, who Intersex Human Rights Australia describes as:

people born with physical sex characteristics that do not fit medical norms for female or male bodies. We are a hugely diverse population, with at least 40 different underlying traits known to science. Intersex variations can become apparent at many different life stages, including prenatally through the use of genetic screening technologies, at birth and in early childhood, at puberty, and later in life – for example when trying to conceive a child.⁹

By attempting to define intersex, the Bill introduces a stigmatising reference to variations of sex characteristics in NSW law for the first time. Specifically, the Bill's definition of 'gender fluidity' describes 'people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation'. Intersex people are not 'disordered'. This language is offensive and has no place in a Bill seeking to regulate education for all students, including intersex children. Finally, the Bill includes a clause which resembles the infamous 'section 28' of the UK Local Government Act, which remained in force from 1988 until 2000. History now records the disastrous impact of this section, which shut down school-based support groups, blocked safe-sex education at the height of the HIV epidemic, and prevented a generation of UK students from learning about – or even talking about – their sexual orientations.¹⁰

LGBTQI+ young people have the right to receive an education free from discrimination on the basis of their gender identity, sexual orientation or sex characteristics. Forcing teachers and other school staff and volunteers to deadname and misgender young people, and limiting students' access to school-based support, creates a school environment that not only excuses discrimination but mandates it.

As well as harming LGBTQI+ students, the Bill will negatively impact trans and gender diverse teachers, who will be unable to affirm their own gender identity without potentially contravening the Bill's censorship of any gender identity different from 'a person's biological sex'. This is because any act that indicates their own gender identity is different from the one assigned to them at birth, even down to simply using 'they/them' pronouns, could be interpreted as being

⁶ 'Deadname' is the name assigned at birth to a trans person, who has since changed their name to one that better reflects their gender. 'Deadnaming' means using a trans person's deadname to refer to them.

⁷ 'Misgendering' means using the wrong gendered pronouns to refer to a trans person.

⁸ Brito, J (2018) 'What does it mean to misgender someone?' and 'What is deadnaming?', *Healthline*, 18 September 2018: <https://www.healthline.com/health/trans/misgendering#why-it-happens> and <https://www.healthline.com/health/trans/deadnaming>.

⁹ Intersex Human Rights Australia, 'Who are intersex people?', *Intersex for Allies*: <https://ihra.org.au/allies/>.

¹⁰ Sommerlad, J. (2018) 'Section 28: What was Margaret Thatcher's controversial law and how did it affect LGBT+ people?', *The Independent*: <https://www.independent.co.uk/news/uk/politics/section-28-explained-lgbt-education-schools-homosexuality-gay-queer-margaret-thatcher-a8366741.html>.

‘teaching, instruction, counselling [or] advice’ that gender diversity exists. No teacher should be forced to deny their own existence to keep their job.

THE BILL THREATENS TEACHERS AND OTHER STAFF WHO SUPPORT EQUALITY AND SAFETY FOR LGBTQI+ YOUNG PEOPLE

The Bill empowers the NSW Education Standards Authority to revoke the accreditation of teachers and other school staff who do not comply with the proposed prohibitions. The practical effect of revoking teachers’ accreditation is that they will lose their jobs, their livelihoods and their future employment prospects in the government school system.

Many school staff understand how important it is to accept, welcome and validate trans and gender diverse young people within educational environments. If the Bill passes, these teachers and other staff will be faced with choosing between knowingly inflicting harm on vulnerable young people in their care or losing their livelihoods. No teacher should be forced to make such a decision. NSW parliamentarians should rule out forcing them to do so.

THE BILL BREACHES ANTI-DISCRIMINATION LAWS

The Bill is also likely to be in breach of anti-discrimination laws. Section 54 of the NSW *Anti-Discrimination Act 1977* provides an exception for acts performed to comply with state legislation. However, there is no equivalent blanket exemption under the Federal *Sex Discrimination Act 1984* (SDA), which protects people from discrimination based on sexual orientation, gender identity and intersex status.

Under the SDA, it is unlawful to discriminate against a person based on their gender identity. It is binding on schools in NSW.¹¹ The NSW Bill mandates discrimination against trans and gender diverse students at government schools based on their gender identity. This means it will be impossible for schools, school staff and the NSW Education Standards Authority to comply with both pieces of legislation.

In cases of inconsistency between state and federal laws, section 109 of the Australian Constitution states that the federal law ‘prevails’, and the state law will, ‘to the extent of the inconsistency, be invalid.’ Even if the NSW Parliament passes the Bill, it will likely be unlawful because of the provisions of the SDA and the operation of the Australian Constitution.¹²

¹¹ Other than specific exceptions for ‘educational institutions established for religious purposes’ where such discrimination is ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’ (section 38). However, that exception does not apply here.

¹² Beck, L. (2021) ‘Mark Latham’s controversial anti-trans kids bill hits constitutional roadblock’, *Lens, Monash University*: <https://lens.monash.edu/@politics-society/2021/01/29/1382751/mark-lathams-controversial-anti-trans-kids-bill-hits-constitutional-roadblock>.

THE BILL'S PROHIBITIONS COULD BE APPLIED TO A WIDE RANGE OF TOPICS

Although the Bill as drafted focuses on 'gender fluidity', the definition of 'parental primacy' and the inclusion of proposed section 17D make clear that its intended scope is, in fact, much broader. The Bill's second reading speech makes clear that curriculum addressing climate change, refugees and Aboriginal and Torres Strait Islander people's experiences of colonisation fall within the proposed concept of 'parental primacy'. However, because the Bill leaves the issues that could fall within 'parental primacy' to be determined subjectively by parents, the list of subjects that could fall within its operation is unlimited.

This breadth of application is dangerous. Climate change is real. It is a looming catastrophe driven by human development. The science that supports these claims is undisputed. Similarly, the harms that colonisation causes to Aboriginal and Torres Strait Islander people are widely recognised and accepted. Understanding and honouring the history that Aboriginal and Torres Strait Islander and non-Indigenous people share is critical to truth-telling, to reconciliation and to eventually 'closing the gap'.

The Bill's wide scope also makes it unworkable in a practical sense. There are already adequate mechanisms for parent engagement in curriculum development and school communities. If schools were required to accommodate every parent's subjective preferences and prejudices within their curriculum, there would be little time left for teaching.

RECOMMENDATION

Trans kids exist. They deserve the same love and support as every other child and the same opportunities to thrive and reach their full potential.

We urge the Committee to reject this Bill. It is discriminatory, likely unlawful and seeks to cause immense and irreparable harm to a generation of young people.

MORE INFORMATION

Thank you for taking the time to consider this submission. If you would like further information, please contact Emily Hamilton, Policy & Advocacy Manager at Community Legal Centres NSW via emily.hamilton@clcnsw.org.au or on (02) 9212 7333.

Yours sincerely,

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