Submission
No 1

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

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Inquiry into Equality Legislation Amendment (LGBTIQA+) Bill

Submission

Emeritus Prof. Patrick Parkinson AM

Thankyou for your invitation to make a submission on this Bill. The Bill proposes radical changes to NSW law across many different statutes. My submission is focused on just four broad policy issues:

- The legal effects of the changes proposed to transgender recognition
- The issues relating to children under 18
- Exemptions for private schools and
- New categories of protected attribute.

By way of background, I am an expert in family law and child protection. I led the review which resulted in the enactment of the Children and Young Persons (Care and Protection) Act 1998, and have in recent years had a lot of involvement with the issue of medical treatment of minors who are gender incongruent.

The effects of the changes proposed to transgender recognition

I don't think the legislation should be passed without its drafters giving far more careful attention to the effects of the changes that the law as drafted are meant to bring about. With the greatest of respect, I don't think they have thought the issues through.

Take the changes proposed to s.38A and the following sections. Currently it prohibits discrimination on transgender grounds, and it is clear from s.38A what transgender means. It is someone who identifies and lives as the opposite sex.

Section 38B is the central provision. It prohibits discrimination against a transgender person, but it also makes clear that there is no obligation to treat the person as if they were of the sex with which they identify, unless they are a "recognised transgender person". This requires that the person has gone a long way down the path of medical transition.

The drafters of the Bill propose two changes, which might look minor, but in fact may be very consequential, depending on what they mean.

Does the Bill intend to include people who identify as 'non-binary'?

In proposed changes to s.38A, the language of opposite sex is changed to "another sex". Presumably this is an attempt to incorporate the self-identification of those who believe there are more than two sexes, for example, people who identify as 'non-binary'. In Schedule 2, there are proposed changes to the Births, Deaths and Marriages Registration Act involving an

'acknowledgement of sex' which specifically allow for a person to identify as 'agender', 'genderqueer' or 'non-binary' and to have their new 'sex' legally recognised.

However, it is far from clear that people who identify as agender, genderqueer or non-binary will come within the protections of the law as it applies to 'transgender' persons in s.38A and following.

The reasons for saying this are first, that the heading to this part of the Act refers to transgender grounds. 'Transgender' is not defined in the dictionary, but ordinarily 'trans' in English refers to crossing over in some way (for example Trans-Tasman). A person who identifies as 'non-binary' or 'genderqueer' is not crossing over the sex binary.

Second, s.23 remains unaltered, referring to just two sexes, male and female. Section 24 continues to refer to 'opposite sex', as does s.34A. (I do not support any change to the law in this, as I hold to the scientific view that homo sapiens is a sexually dimorphic species, notwithstanding the rare intersex conditions that make identification with one or other sex less than straightforward).

Third, the proposed amendment to s.38A refers to "another sex", but it has now become common for people to distinguish between 'sex' and 'gender'. If 'non-binary' is understood as a gender identity and not a sex (and this is the only way consistent with basic biology that it can be understood) then the amendment to s.38A won't achieve any effect. A court, advised by such a world-renowned biologist as Prof. Richard Dawkins, would be entitled to rule that as there are only two sexes, the change from 'opposite sex' to 'another sex' has not brought about any change to the law. The same applies to persons who identify as 'agender' or 'genderqueer'.

The effect of removing the category of 'recognised transgender person'

Section 38B(1)(c) is amended to read as follows. It is discrimination if someone:

> "treats the aggrieved person as being of the person's former sex or a different sex to that which the person identifies, or requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex or a different sex to that which the person identifies comply or are able to comply, being a requirement or condition which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply."

This subsection, which, with these proposed changes, essentially says that people 'discriminate' if they do not treat someone as the sex with which they identify. There is no requirement that the person have a registered sex that conforms to their chosen gender identity. So the result is that if, contrary to what I have said above, the effect of s.38A is in fact to recognise that someone who identifies as "non-binary" or "genderqueer" is a 'different sex', then it is required of everyone else in the community to treat them as if they are in fact of a different sex.

But what does this mean in practice? What does it mean for someone who does not believe there is a sex called 'genderqueer', to have to treat someone as if they are of this newly created sex? What happens to their biological sex if they register a change?

If the manager of a public swimming pool requires the female-bodied person who says they are 'non-binary' still to use the changing rooms allocated to people with female bodies, then are they breaching the law by treating the aggrieved person as their former sex? Is a hospital breaching the law if the female-bodied but non-binary person is placed in a women's ward? The 'or' after 'identifies' in the second line indicates that the test of reasonableness having regard to the circumstances of the case does not apply to the first line – treating someone as of a different sex to that with which they identify.

There is a further problem with leaving in the words 'former sex' after deleting the words 'recognised transgender person'. What, does 'former sex' mean in the absence of a requirement to be registered officially as a member of the opposite sex under the changes proposed in Schedule 2? A female-bodied person who identifies as male is still a female-bodied person. Nothing about their anatomy or reproductive capacity changes because their self-identification changes. So a person may have a sex and a gender identity with which their sex is incongruent, but it makes no sense to say that the declaration of a new gender identity, which refers to a state of mind, has any effect on their sex. They do not have a 'former sex', since their sex remains unchanged.

It will be seen from this brief discussion that the Bill will, if enacted, create an extraordinarily complex body of law in which it is quite unclear what the effect of the amendments will be. These may depend in part on whether the person has registered a different sex under the proposed changes in Schedule 2, and how a sex descriptor that is neither male nor female intersects with other parts of the Anti-Discrimination Act which indicate there are only two sexes.

The effects on the rights of others

The problems mount when one considers the question whether a self-identified female who is a male-bodied person should be entitled to be treated, for all purposes, as a female. This is the effect of the proposed change to s.38B(1)(c). It is also the effect of the proposed s.32H in the amended births, deaths and marriages legislation. That section is as follows:

> **Effect of alteration of record etc**
>
> (1) A person whose record of sex is altered under this part is, for the purposes of a law of this State, a person of the sex stated in the altered record.
>
> (2) A person for whom a registration of an acknowledgement of sex is recorded under this part is, for the purposes of a law of this State, a person of the sex stated in the record.
>
> (3) A person for whom a recognition certificate is in force is, for the purposes of a law of this State, a person of the sex stated in the recognition certificate.

What then is the effect of these changes on existing sections of the law that protect the interests of people who have legitimate reasons for not treating a male-bodied person as the sex with which they identify? There is a provision in s.34A(3A) of the current version of the Anti-Discrimination Act concerning registered clubs for persons of one sex. They are able to exclude someone who identifies with that sex, but is not in fact of that sex. Is that impliedly repealed in the case of someone who has registered a female sex and is recognised, for the purposes of NSW law, as female notwithstanding being a male-bodied person?

What about issues affecting women other than in registered clubs? Will women's gyms still be allowed to be just for female-bodied persons? It is important for the drafters of this Bill to clarify what they intend should be the effect of these changes on women's rights to single sex facilities in which they can have bodily privacy and dignity. There are also implications for the rights of lesbians. Take for example an issue that has arisen in Tasmania, where a lesbian group has been refused permission to limit attendance at their meetings to biological females. The application in question was brought by a member of the LGB Alliance, seeking an exemption from the Anti-discrimination Commissioner. She wanted to organise "same sex attracted dances" involving performances as "drag kings". This sounds like the kind of event that would be embraced by the Sydney Mardi Gras. Yet the application was refused by the Anti-discrimination Commissioner and a tribunal, because it would mean excluding male-bodied persons who self-identify as female.

Would there be a similar outcome if this legislation is passed? Does it depend on whether the male-bodied person has changed their sex legally? Is it lawful for a lesbian group to exclude a male-bodied person who identifies as non-binary or genderqueer? I cannot find in the Bill any answers to these questions. My impression is that the Bill is conceptually incoherent. There will be sections of the Anti-Discrimination Act as amended that look to be irreconcilable. At the very least, the Bill needs a substantial explanatory memorandum to identify what Parliament intends, which can only realistically be provided if it is a Bill introduced by the government.

It is up to Parliament whether it wants to decide that trans rights, or the rights of males who say they are 'trans', should trump lesbian rights, but in a Bill purporting to be about LGBTQI+ discrimination, the drafters of the Bill should be transparent with MPs and the general public. What choices do they want the Parliament to make about irreconcilable rights within the rainbow community and in terms of the rights of women to protected single sex spaces and facilities?

The issues relating to children under 18

Apart from these conceptual problems, which go to the heart of the Bill, it is important that the legislation does not adversely affect the rights of gay, lesbian and gender diverse young people under the age of 18.

Gender identity in childhood and adolescence

There is now a lot of confusion in schools and elsewhere in terms of what it means for a child or adolescent to have a 'gender identity' and what consequences flow therefrom.

For this reason, I recommend that if this Bill is passed, a new definition of 'transgender' needs to be introduced to s.4 to the effect that a transgender person is someone who identifies as another sex and is over the age of 18.

My reason for saying this is that the grounds for recognition of trans and gender diverse persons keep shifting. Less than a decade ago, a reasonably acceptable definition would have been that a child or young person who meets the criteria for gender dysphoria in the DSM (the Diagnostic and Statistical Manual of Mental Disorders) has a gender identity that is incongruent with natal

sex. Now the ground has shifted and some argue that a medical diagnosis of gender dysphoria is not needed. Most schools accept a child as having a gender identity different to natal sex if the enrolling parent says so, and without the need for a mental health diagnosis. This can store up problems for future years. The girl who pretends to be a boy in primary school will eventually develop the characteristics of a young woman, and her voice will not deepen along with her peers, unless she takes medications that could lead her to be infertile for life. That difficulty may push her into wanting those medications to avoid the embarrassment of being a 'boy' at school who develops physically as a girl.

Transgender identification used to be a rare problem, emerging first in early childhood, and mainly for natal males. Now the great majority of the children and young people who identify as gender diverse or 'trans' are girls with complex histories of adverse childhood experiences and multiple psychiatric comorbidities. Many are on the autism spectrum.

Adolescence is a time of identity formation and exploration. Identity, at this age, is fluid, because part of the process of adolescence is working out 'who I am' in relation to peers, parents and others. It follows that we shouldn't assume that a child who adopts a gender identity that is fashionable amongst her peers is reflecting some innate and unchangeable truth about herself that will never change. It is very likely to change.

In these circumstances, it is best that the law does not seek to concretise a fluid gender identity by insisting that others treat the child as the gender with which she currently identifies. The overwhelming evidence from research is that even children who are consistently gender diverse from early childhood onwards will not grow up to be transgender if they are not treated as such and not medicated. As they go through puberty, these issues resolve, and most grow into gay or lesbian adults. So pushing these children and young people towards puberty blockers and cross-sex hormones means denying to them a future as gay or lesbian adults with healthy bodies.

If members of Parliament are concerned about ill-treatment of gender diverse children by adults then the best way to tackle this would be by making sure that school policies are sufficiently nuanced and flexible to allow for proper pastoral care of the child or young person while also respecting the rights and interests of other children in the school.

Medical treatment of minors

The drafters of this Bill want to amend the Children and Young Persons (Care and Protection) Act 1998 to say that a young person (16 years and above) may make a decision about the young person's own medical or dental treatment as validly and effectively as an adult. The Minors (Property and Contracts) Act already deals with medical treatment of minors so why the duplication?

Given the purpose of the rest of this Bill, it is reasonable to assume that the drafters of this Bill want to allow doctors to be able to give cross-sex hormones to a 16 year old without parental knowledge or consent, even though this could risk permanent infertility as well as numerous other adverse medical consequences. This is not affected by s.175 (special medical treatment) because

that section only prohibits such treatment without authorisation of a tribunal for children under 16.

The drafters also want to provide that for a child under 16, one parent's consent to medical treatment is enough and that a doctor may treat a child under 16 without the knowledge and consent of either parent if the child is capable of understanding the nature, consequences and risks of treatment and it is in the child's best interests.

Such changes would stand in contradiction to the decision of the Family Court in *Re Kelvin* to the effect that the consent of both parents is needed for puberty blockers or cross-sex hormone treatments as a treatment for gender dysphoria if the child is under 18. The conflict with the legal position in federal law would create yet more uncertainty.

The proposed changes, allowing for the prescription of puberty blockers by doctors without parental knowledge and consent ought to alarm Members of Parliament. For a long time, we were told that puberty blockers were perfectly safe and reversible, and they are when used to treat precocious puberty, for which they are licensed. However, when used, off-label, to block puberty in the normal period for pubertal development there are significant risks. There is now sufficient evidence, for example, that they could adversely affect brain development, as Prof Sallie Baxendale's recent research demonstrates.

Furthermore, there is ample evidence that almost all children placed on puberty blockers will go on to cross-sex hormones, and this will render them infertile as well as affecting their capacity for sexual pleasure. Boys, treated in this way from the onset of puberty will never be able to experience orgasm. Girls will experience an impaired capacity for sexual pleasure due to vaginal atrophy and a greatly enlarged clitoris which can sometimes be painful.

I have not seen any gender clinic consent form that has spelled out to parents, and their children, what will happen to their sexual function if the children have these treatments. For boys, in particular, the medical pathway should now be understood as indescribably cruel given what we now know of its impacts and the lack of any objective way of identifying who will remain 'trans' and who will grow out of it if puberty is allowed to progress in the normal way.

These radical treatments have been promoted as necessary lifesaving interventions to address the risk of children committing suicide. However, it turns out that isn't true either. There is an elevated risk of suicide attempts in this cohort, but most have psychiatric comorbidities, and the risk of suicide attempts is no greater than in matched cohorts of young people with psychiatric illnesses. Furthermore, suicide, while always tragic, remains rare amongst trans-identified children and young people.

Despite these issues, puberty blockers are being given out liberally in the Hunter region, and increasingly by Westmead Hospital. Private doctors are entirely unregulated in this area. In my litigation work, I have become aware that practices in this country vary widely, and some at least are inconsistent with what clinicians say publicly are their practices. There is a grave risk of harm to same-sex attracted young people from unnecessary and irreversible medications.

There is a great need now for strict regulation of this practice, as the NHS has decided in England and as occurs in Scandinavian countries. It is certainly not the time to decrease the regulation of puberty blockers or cross-sex hormones and to allow doctors to act without parental knowledge and consent to authorise treatments that have lifelong and very serious consequences.

While some activists still claim that less than 1% of young people will come to regret the treatment, this is based on an old study concerning regret about genital surgeries. An average of the recent studies would indicate a regret rate of around 8% now; but we don't really know, because this is all so new. The large number of teenagers with mental health issues who now identify as 'trans' may not come to regret it for many years to come, when they struggle to form satisfying intimate relationships and want to have children. Few of them have been told of the impact of these treatments on their sexual function and capacity for sexual pleasure. Leading doctors in gender clinics in North America have acknowledged that adolescents are incapable of giving an informed consent, but they give the drugs anyway.

Exemptions for private schools

There is no need for all private schools to have the broad exemptions they have; but faith-based schools and the parents who send their children to these schools need to have their religious values respected.

There needs to be a nationally consistent approach to this issue, and this is a matter already under consideration at federal level.

New categories of protected attribute

The Bill introduces two new categories of protected attribute – that is characteristics or personal histories that require the law's special protection through anti-discrimination law. No explanation is given for why there is the need for special protection for either group. There are endless more characteristics or personal histories that could be added to the discrimination list; but it is really for the proposers of the Bill to show why there is a compelling justification for doing so.

The first new category is those with variations of sex characteristics. The term is defined as "a person who has an innate variation of primary or secondary sex characteristics that differ from norms for female or male bodies", so persons with disorders of sex development, to use the technical term. Almost all of these are invisible, and do not prevent classification of the person as male or female respectively. Those with intersex conditions have been incorporated by political campaigners into the LGBTQ+ community, but generally without their consent. Their variations of sex characteristics are quite different in nature to being gay or lesbian, being a sexual orientation, or having a self-identification as transgender. There is no evidence I am aware of that there is now, or ever has been, a problem about discrimination. The only issues that have arisen have concerned eligibility for elite women's sports in rare cases.

The need to protect sex workers from discrimination is even less clear. There are many in the community, and this is likely to include a large swathe of voters in western Sydney, who disapprove of prostitution, whether male or female. They regard it as morally wrong. They would argue it

should not be sanitised as if it were no different to an innate characteristic such as race. Of course, some prostitutes are victims of their circumstances, and may indeed be victims of sex trafficking, but by no means all. Having an OnlyFans account to make money from pictures of your naked body is almost invariably a matter of choice. That is 'sex work' within the meaning of the Bill, being the provision of a sexual service for commercial gain. If it is legal for someone to engage in this form of porn creation, it ought also to be legal for others to disapprove of it.

Why then, the compelling need for these new categories of protected attribute? Every time the Anti-Discrimination Act is amended in this way, it gets longer and longer, more and more complex, harder for the general public to understand. Laws for the general public need to be easy to understand and intuitively right – that is, the kind of thing most decent people would agree with anyway.

Conclusion

There are too many problems with this Bill to enact it, and no minor amendments that the Committee could propose to salvage it. A law for all people throughout NSW cannot be based upon the unscientific beliefs or moral values of just a few people in Paddington or Kings Cross with which the majority of the population disagree.

The time of MPs and all those making submissions would be well-spent if, out of the work done on this Bill, the Committee could recommend a public inquiry into all aspects of how 'transgender rights' affect other rights and what choices should be made where rights conflict. There is also a great need for a public inquiry into the sterilisation and destruction of sexual function of children and young people, many of whom would, if not medicated, grow up to be gay or lesbian.

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