

Education Legislation Amendment (Parental Rights Bill)

ARACY's Response to Question on Notice

May 2021

1. In relation to gender as a social construct.

Question on notice:

The CHAIR: As I said, the purpose of the bill is to go to the teaching of gender in our schools and the bill explicitly states not to teach it as a social construction. So in reading all the submissions against the bill I was obviously expecting many organisations to vigorously defend the theory of gender as a social construction. But nobody seems to have done that. How and why is gender a social construction?

The CHAIR: That is in evidence—and did not tell the family. So, Jack has asked me a question. I have given you a brief summary and will be presenting more of that evidence as the inquiry unfolds, but I do come back to that final question that I wanted to ask Jain. **If gender is not a social construct, where is the harm in this bill in prohibiting the teaching of gender as a social construct?**

Ms MORALEE: I would like to take that question on notice.

The CHAIR: Thank you.

Dr NOBLE: May I make a comment in regard to the question?

The CHAIR: Yes, sure.

Dr NOBLE: I think the medical approach to taking gender fluidity or gender identity as a social construct might be an oversimplification of the concept. It is quite clearly defined by medical institutions that gender identity is a blend—it is: A person's innermost concept of self as male, female, a blend of both or neither. One's gender identity can be the same or different from their sex assigned at birth. It is fairly widely accepted that there is a distinction between gender and sex. Whether the textbooks are up to date with that in the New South Wales schooling system is a question.

The CHAIR: Maybe you can forward that medical evidence that you have referred to on notice?

Dr NOBLE: Absolutely. It is in my submission in appendix 1.1.

ARACY's Response:

Key points:

- **Gender and biological sex are distinct concepts.**
- **This distinction is recognised in current scientific literature, with emerging evidence of a biological contribution to gender identity.**
- **The distinction is also widely recognised by international and Australian health institutions, multiple Australian government organisations, and independent international organisations.**
- **Biological sex is assigned at birth based on external genitalia.**
- **Gender [norms] are socially constructed.**
- **Gender identity is a separate concept from socially constructed gender norms and encompasses the experience and sense of identity of a person.**

Current scientific literature recognises the distinction between biological sex and gender identityⁱ. Furthermore, current scientific literature is suggestive of a biological contribution to the formation of gender identity^{ii,iii,iv}. For example, differences in brain size and structure noted between men and

women are also noted in transgender men and women, where transgender people have brain features resembling their identified gender rather than their biological sex^v. The underlying mechanism of gender identity formation is unclear, but is thought to be driven in part by foetal hormonal exposure during pregnancy:

“The data summarised in the present review suggest that both gender identity and sexual orientation are significantly influenced by events occurring during the early developmental period when the brain is differentiating under the influence of...hormones, genes and maternal factors.”^{vi}

Health institutions also distinguish sex and gender. Biological sex is assigned at birth based on the appearance of external genitals. Gender identity is a complex phenomenon encompassing a person’s experience and sense of self. The concept of gender as a ‘social construct’ is used when discussing gender norms or gender stereotypes. This is when a particular gender is associated with stereotypical roles, behaviours, and societal expectations that are socially constructed^{vii} (for example, that girls play with dolls). This concept of gender/gender norms is often used in health settings to discuss the harms associated with rigid gender norms. For example, rigid gender norms around male masculinity can encourage risk-taking behaviour such as perpetrating violence^{viii}. These concepts are neatly summarised by the World Health Organisation^{ix}:

“Gender refers to the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time...”

Gender interacts with but is different from sex, which refers to the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs. Gender and sex are related to but different from gender identity. Gender identity refers to a person’s deeply felt, internal and individual experience of gender, which may or may not correspond to the person’s physiology or designated sex at birth.”

Medical institutions in Australia also distinguish sex and gender identity, and provide treatment for children and young people who may experience gender dysphoria. Gender dysphoria¹ is the distress arising from having a biological sex assigned at birth different from one’s gender identity. Australian medical organisations which acknowledge the distinction between sex and gender identity include the Royal Australian and New Zealand College of Psychiatrists^x, the Royal Australian College of General Practitioners^{xi}, and the Royal Children’s Hospital Melbourne^{xii}. The Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents^{xiii} acknowledges the vital role of gender-affirming care in the management of gender dysphoria, including the importance of using gender-affirming language (i.e. the child’s preferred name and pronouns) and social transitioning in

¹ Note that having a gender identity different from one’s sex assigned at birth is in itself not a disease; gender dysphoria specifically refers to the distress associated with this state which is not ubiquitous. This is widely accepted including by the World Health Organisation^{ix}, the Royal Australian and New Zealand College of Psychiatrists^x, the Royal Australian College of General Practitioners^{xi}, and the Royal Children’s Hospital Melbourne^{xii}.

reducing distress and associated mental health problems^{xiv}. Also emphasised is the importance of avoiding harm, which may occur if gender-affirming treatment is withheld:

“Withholding of gender affirming treatment is not considered a neutral option, and may exacerbate distress in a number of ways including increasing depression, anxiety and suicidality, social withdrawal...

In the past, psychological practices attempting to change a person’s gender identity to be more aligned with their sex assigned at birth were used. Such practices, typically known as conversion or reparative therapies, lack efficacy, are considered unethical and may cause lasting damage to a child or adolescent’s social and emotional health and wellbeing.”^{xv}

Lastly, the distinction between biological sex and gender identity is widely acknowledged by non-medical organisations. These include: the United Nations^{xvi}, the Australian Human Rights Commission^{xvii}, Australian Bureau of Statistics^{xviii}, the Australian federal government^{xix}, and in the Australian Sex Discrimination Act 1984^{xx}. Indeed, the Australian government allows a change of gender on government records, stating that “individuals are encouraged to progressively ensure their documents reflect their preferred gender” and acknowledging that this may be different from their sex assigned at birth^{xxi}.

Gender and biological sex are therefore recognised as distinct concepts in current scientific literature, leading national and international health and medical institutions, multiple Australian government organisations, and the United Nations.

The Australian Standards of Care and Treatment Guidelines for trans and gender diverse children and adolescents was referenced regularly during the hearing and provides a neat summary of common terminology. This was included in the original submission and is attached again below for convenience. A copy of the full document to the Committee has also been provided as requested.

Gender identity

A person's innermost concept of self as male, female, a blend of both or neither. One's gender identity can be the same or different from their sex assigned at birth.

Gender expression

The external presentation of one's gender, as expressed through one's name, clothing, behaviour, hairstyle or voice, and which may or may not conform to socially defined behaviours and characteristics typically associated with being either masculine or feminine.

Gender diverse

A term to describe people who do not conform to their society or culture's expectations for males and females. Being transgender is one way of being gender diverse, but not all gender diverse people are transgender.

Assigned male at birth

A person who was thought to be male when born and initially raised as a boy.

Assigned female at birth

A person who was thought to be female when born and initially raised as a girl.

Trans or transgender

A term for someone whose gender identity is not congruent with their sex assigned at birth.

Cisgender

A term for someone whose gender identity aligns with their sex assigned at birth.

Trans boy/male/man

A term to describe someone who was assigned female at birth who identifies as a boy/male/man.

Trans girl/female/woman

A term to describe someone who was assigned male at birth who identifies as a girl/female/woman.

Non-binary

A term to describe someone who doesn't identify exclusively as male or female.

Gender fluid

A person whose gender identity varies over time.

Agender

A term to describe someone who does not identify with any gender.

Brotherboy and Sistergirl

Aboriginal and Torres Strait Islander people may use these terms in a number of different contexts, but they are often used to refer to trans and gender diverse people. Brotherboy typically refers to masculine spirited people who were assigned female at birth. Sistergirl typically refers to feminine spirited people who were assigned male at birth.

Gender dysphoria

A term that describes the distress experienced by a person due to incongruence between their gender identity and their sex assigned at birth.

Social transition

The process by which a person changes their gender expression to better match their gender identity.

Medical transition

The process by which a person changes their physical sex characteristics via hormonal intervention and/or surgery to more closely align with their gender identity.

Figure 1: Terminology as defined in the Australian Standards of Care and Treatment Guidelines for trans and gender diverse children and young people, as published by the Royal Children Hospital Melbourne.

2. In relation to bulletin 55 'Transgender students in schools'

Question on notice:

The Hon. MATTHEW MASON-COX: Thank you all for coming to it. It has been very interesting to listen to you and certainly to read your submissions. Are you aware of bulletin 55, "Transgender students in schools", issued by the New South Wales Department of Education? I might just give you some homework, if that is okay. As we understand it, it came out in 2014 and it has been revised, I believe, on a number of occasions. I would like you to take that away—and the secretariat can provide you with a copy—so we can get your views on whether it needs to be revisited and how you would revisit it in relation to this issue. That is the first thing. I might just take you to one issue that it deals with, and that is privacy, legislation and transgender students. What is your view in relation to a circumstance where a transgender child makes a decision at school or in that school environment and is affirmed, but the parents

of that child do not know that the child has made a decision in that regard? Do you believe a parent should be informed by the school? If so, in what circumstances?

ARACY's Response:

Bulletin 55 currently recommends that "School and other departmental staff should seek legal advice in circumstances where parents or carers and/or the student object to the proposed use or disclosure of a student's personal and/or health information."^{xxii}

ARACY strongly supports the development of protocols for dealing with LGBTIQ students who disclose their identity to school staff. These are complex issues where tensions between the rights and needs of parents and the rights and needs of children and young people exist. A clear approach to managing such situations that balances these needs is necessary. It is beyond the scope of ARACY's expertise to advise on the legal requirement of disclosure of LGBTIQ identity to school staff. However, ARACY supports the right of children to have a say in issues that affect them^{xxiii}, and points to the concept of 'Gillick competence' (also known as the mature minor principle) whereby children under the age of 18 may consent to medical treatment provided they have the "maturity to understand the nature and consequences of the treatment"^{xxiv} without parental consent or knowledge. This includes prescription of medication such as oral contraceptives. ARACY also believes that when developing such protocols, the **wellbeing of the child is paramount**, and noting the evidence indicating that family rejection is a driver of homelessness in LGBT people^{xxv}. In summary, children have a fundamental human right to have a say in issues that affect them, which in Australia translates into decisions around medical treatments where they have the capacity to do so. There is also a risk of harm to the child if families are informed of a child's gender identity and family rejection ensues. Therefore, the capacity of the child, the family environment, and most of all the wellbeing of the child should be carefully considered when developing protocols around disclosure of gender identity to families.

3. In relation to Uniting Network submission recommendations:

Question on notice:

Mr DAVID SHOEBRIDGE: I just might ask you to take this on notice. The Uniting Network have put in a detailed submission. They have put forward six recommendations in response to the bill. They propose incorporating more support services for LGBTIQ children within schools by: improving facilities; providing teacher training both preservice and in-service on LGBTIQ issues, including but not limited to transgender and gender diverse students; development of protocols about interactions between teachers and between school staff and parents; providing enhancements for the curriculum; and, removing exemptions about discrimination. Can I ask you to take on notice what your position is about those six recommendations from the Uniting Network?

ARACY's Response:

The six recommendations made by Uniting Network NSW/ACT and ARACY's response is as follows:

1. *Incorporate more support services for LGBTIQ children within NSW Schools*

Given the significant mental health issues experienced by gender diverse children and young people, heightened vulnerability during adolescence, and the important role schools can play in contributing to both academic and social/emotional wellbeing outcomes, additional supports in schools would be a very reasonable next step. This should be undertaken in direct consultation with children and young people who are gender diverse, should consider existing evidence on the effectiveness of various supports, and undergo monitoring and evaluation throughout implementation to ensure the objectives of the intervention are being met.

2. Improve facilities for transgender and gender diverse students in all NSW schools

ARACY supports the improvement of facilities for transgender and gender diverse students in schools where these facilities are designed to reduce inequity of health and wellbeing outcomes experienced by gender diverse students. These facilities should be designed considering the best available evidence and include broad stakeholder consultation, specifically including direct consultation with children and young people who identify as gender diverse. Appropriate evaluation and monitoring for effectiveness should also be included during implementation.

3. Provide teacher training (primary and high school) around LGBTIQ issues, including but not limited to Transgender and Gender Diverse students. This would include PreService and InService Training.

Given the significant role that teachers can play in the wellbeing of gender diverse children and young people, education and training around LGBTIQ issues would be appropriate. This should be undertaken in consultation with teachers and children and young people themselves (including LGBTIQ children and young people) to ensure the training was meeting their needs, should consider available evidence on effective content and strategies, and monitored and evaluated for effectiveness at implementation. Given children begin to express their gender identity as toddlers^{xxvi}, and begin to display same sex favouritism by age 3^{xxvii}, it would be appropriate to include primary school teachers in this training.

4. Development of protocols to protect LGBTIQ students who may disclose their LGBTIQ identity to school staff (teachers, psychologists, counsellors, nurses, office staff etc), and require protection of that disclosure from their parents for their own safety

ARACY strongly supports the development of protocols for dealing with LGBTIQ students who disclose their identity to school staff, if these are not already in place (noting bulletin 55 which considers this issue^{xxviii}). These are complex issues where tensions between the rights and needs of parents and the rights and needs of children and young people exist. A clear approach to managing such situations that balances these needs is necessary. It is beyond the scope of ARACY's expertise to advise on the legal requirement of disclosure of LGBTIQ identity to school staff. However, ARACY supports the right of children to have a say in issues that affect them, and points to the concept of 'Gillick competence' (also known as the mature minor principle) whereby children under the age of 18 may consent to medical treatment provided they have the "maturity to understand the nature and consequences of the treatment"^{xxix} without parental consent or knowledge. This includes prescription of medication such as oral contraceptives. ARACY also believes that when developing such protocols, the **wellbeing of the child is paramount**, and noting the evidence indicating that family rejection is a driver of homelessness in LGBT people^{xxx}. In summary, children have a fundamental human right to have a say in issues that affect them, which in Australia translates into decisions around medical treatments where they have the

capacity to do so. There is also a risk of harm to the child if families are informed of a child's gender identity and family rejection ensues. Therefore, the capacity of the child, the family environment, and most of all the wellbeing of the child should be carefully considered when developing protocols around disclosure of gender identity to families.

5. *Provide significant enhancements to the PDHPE Curriculum for inclusion on understanding for all students around LGBTIQ citizens and appropriate sexual health considerations for LGBTIQ students*

Enhancements to school curricula which would improve social cohesion through empathy and understanding of LGBTIQ issues would be consistent with the goals of the Mparntwe Declaration^{xxxi}, which has been signed by all Australian states and territories along with the Federal Education minister in 2019. Appropriate sexual health education should be inclusive of all identified genders and sexualities, and should not discriminate against gender and sexually diverse young people by depriving them of relevant and applicable sexual health education that is otherwise provided to their cis-gender and heterosexual identifying peers. It is also worth noting that biological sex and gender identity are distinct concepts recognised by international and Australian health institutions as well as a range of Australian government bodies, with emerging evidence of biological factors influencing the development of gender identity as distinct from biological sex. This information is relevant to a range of school disciplines including PDHPE, civics and citizenship education, and biological sciences.

6. *Remove exemptions for non-government schools in NSW that allow them to discriminate against LGBTIQ students, students of LGBTIQ families and LGBTIQ staff.*

This recommendation is outside the scope of ARACY's expertise.

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- ⁱ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6677266/>
- ⁱⁱ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6677266/>
- ⁱⁱⁱ <https://pubmed.ncbi.nlm.nih.gov/25667367/>
- ^{iv} <https://pubmed.ncbi.nlm.nih.gov/32204531/>
- ^v <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6677266/>
- ^{vi} <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6677266/>
- ^{vii} https://www.who.int/health-topics/gender#tab=tab_1
- ^{viii} https://www.who.int/health-topics/gender#tab=tab_1
- ^{ix} https://www.who.int/health-topics/gender#tab=tab_1
- ^x <https://www.ranzcp.org/files/resources/submissions/submission-for-a-state-wide-network-for-children-t.aspx>
- ^{xi} <https://www.racgp.org.au/afp/2015/november/gender-dysphoria/>
- ^{xii} <https://www.rch.org.au/uploadedFiles/Main/Content/adolescent-medicine/australian-standards-of-care-and-treatment-guidelines-for-trans-and-gender-diverse-children-and-adolescents.pdf>
- ^{xiii} <https://www.rch.org.au/uploadedFiles/Main/Content/adolescent-medicine/australian-standards-of-care-and-treatment-guidelines-for-trans-and-gender-diverse-children-and-adolescents.pdf>
- ^{xiv} <https://www.rch.org.au/uploadedFiles/Main/Content/adolescent-medicine/australian-standards-of-care-and-treatment-guidelines-for-trans-and-gender-diverse-children-and-adolescents.pdf>
- ^{xv} <https://www.rch.org.au/uploadedFiles/Main/Content/adolescent-medicine/australian-standards-of-care-and-treatment-guidelines-for-trans-and-gender-diverse-children-and-adolescents.pdf>
- ^{xvi} <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>
- ^{xvii} https://humanrights.gov.au/sites/default/files/document/publication/ahrc_transgender_and_gender_diverse_guidelines_2019.pdf
- ^{xviii} <https://www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release#sex>
- ^{xix} <https://www.ag.gov.au/sites/default/files/2020-03/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>
- ^{xx} <https://www.legislation.gov.au/Details/C2018C00499>
- ^{xxi} <https://www.ag.gov.au/sites/default/files/2020-03/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>
- ^{xxii} <https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools>
- ^{xxiii} <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- ^{xxiv} child with the maturity to understand the nature and consequences of the treatment has the legal capacity to consent on their own behalf, without the necessity for parental consent or knowledge
- ^{xxv} <https://www.lmcf.org.au/getmedia/edadb1a8-dff0-43e3-9410-24dcaa41ea89/LGBTI-Homelessness-Stage-1-Report.pdf.aspx>
- ^{xxvi} <https://raisingchildren.net.au/pre-teens/development/pre-teens-gender-diversity-and-gender-dysphoria/gender-identity>
- ^{xxvii} <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3747736/>
- ^{xxviii} <https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools>
- ^{xxix} child with the maturity to understand the nature and consequences of the treatment has the legal capacity to consent on their own behalf, without the necessity for parental consent or knowledge
- ^{xxx} <https://www.lmcf.org.au/getmedia/edadb1a8-dff0-43e3-9410-24dcaa41ea89/LGBTI-Homelessness-Stage-1-Report.pdf.aspx>
- ^{xxxi} <http://www.educationcouncil.edu.au/Alice-Springs--Mparntwe--Education-Declaration.aspx>